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# NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

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HAROLD S. MARENUS, CLERK U.S. BKCY. APP. PANEL OF THE NINTH CIRCUIT

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In re:

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v.

CALIFORNIA,

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) BAP No. CC-06-1140-DTMo

) Bk. No. LA 01-43591-VZ

HUMBERTO LUNA; CAROLINA LUNA,

Appellants,

Appellee.

Debtors.

HUMBERTO LUNA; CAROLINA LUNA,

CALIFORNIA NATIONAL BANK, fka PEOPLE'S BANK OF

 $\mathbf{M} \ \mathbf{E} \ \mathbf{M} \ \mathbf{O} \ \mathbf{R} \ \mathbf{A} \ \mathbf{N} \ \mathbf{D} \ \mathbf{U} \ \mathbf{M}^1$ 

Argued and Submitted on January 17, 2007 at Pasadena, California

Filed - February 2, 2007

Appeal from the United States Bankruptcy Court for the Central District of California

Honorable Vincent P. Zurzolo, Chief Bankruptcy Judge, Presiding.

Before: DUNN, TCHAIKOVSKY<sup>2</sup> and MONTALI, Bankruptcy Judges.

This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have ( $\underline{\text{see}}$  Fed. R. App. P 32.1), it has no precedential value.  $\underline{\text{See}}$  9th Cir. BAP Rule 8013-1.

<sup>&</sup>lt;sup>2</sup> Hon. Leslie J. Tchaikovsky, Bankruptcy Judge for the Northern District of California, sitting by designation.

#### I. INTRODUCTION

The debtor-appellants Humberto and Carolina Luna ("Debtors") appeal the bankruptcy court's order denying their motion to avoid the judicial lien of appellee California National Bank (the "Bank") on their residence property. We REVERSE and REMAND for a further evidentiary hearing.

#### II. FACTS

The Debtors filed a voluntary chapter 7 bankruptcy petition on November 8, 2001.<sup>3</sup> In their Schedule D, the Debtors listed the Bank's civil judgment in case no. BC238375 as a secured obligation (the "Judgment Lien") in an unknown amount. The Debtors received their discharge on April 15, 2002, and their chapter 7 case was closed on April 29, 2002. The Debtors did not file a motion to avoid the Judgment Lien before their chapter 7 case was closed.

Apparently, the Debtors attempted unsuccessfully to obtain refinancing for their residence in late 2004, as an escrow agent contacted the Bank in December 2004 to request a payoff for the Judgment Lien. The Debtors moved to reopen their chapter 7 case in July 2005. The bankruptcy court granted the Debtors' motion to reopen by order entered on August 4, 2005. The order provided that the case would remain open for 120 days from the date of entry of the order reopening "to allow debtors to pursue the relief requested in the Motion."

<sup>&</sup>lt;sup>3</sup> Unless otherwise indicated, all "Code," chapter and section references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-1330, prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23, as the case from which this appeal arises was filed before October 17, 2005, the effective date of most

BAPCPA provisions.

The Debtors served their motion to avoid the Bank's lien (the "Motion to Avoid Lien") on November 8, 2005, and filed it with the bankruptcy court on November 22, 2005. The Bank filed its Opposition (the "Opposition") to the Motion to Avoid Lien on November 23, 2005. The Bank set a hearing on the Opposition for January 3, 2006. However, once the Opposition was filed, under Central District of California Local Bankruptcy Rule 9013-1(g)(3), it was the Debtors' responsibility to schedule the hearing on the Motion to Avoid Lien. Since the Debtors failed to schedule their Motion to Avoid Lien for hearing, no hearing on the Motion to Avoid Lien for hearing, no hearing on January 3, 2006, even though counsel for the Debtors and the Bank were at the court expecting to be heard.

Thereafter, on January 17, 2006, after the 120-day period from the date of entry of the order reopening the case had run, the Debtors' attorney finally scheduled the Motion to Avoid Lien for a hearing to be held on March 21, 2006. On February 23, 2006, the Debtors filed an appraiser's declaration in support of their Motion to Avoid Lien. On March 7, 2006, the Bank filed objections to the Debtors' evidence, a Supplemental Opposition to the Motion to Avoid Lien supported by the declaration of the Bank's counsel, and a Request for Judicial Notice of certain documents in the record tending to support the Bank's arguments. On March 9, 2006, the Debtors filed a response to the Bank's Opposition.

The Motion to Avoid Lien was heard on March 21, 2006 (the "March 21st Hearing"), and the bankruptcy court entered an order denying the Motion to Avoid Lien on March 30, 2006. The

bankruptcy court denied the Motion to Avoid Lien because "procedural irregularities" caused by the Debtors' counsel resulted in the Motion to Avoid Lien not being set for hearing in a timely manner. The Debtors filed a timely Notice of Appeal on April 7, 2006.

#### III. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. \$\$ 1334 and 157(b)(1) and (b)(2)(0), and we have jurisdiction under 28 U.S.C. \$ 158(c).

### IV. ISSUE<sup>4</sup>

Whether the bankruptcy court erred in denying the Motion to Avoid Lien where the Bank did not demonstrate prejudice.

#### V. STANDARDS OF REVIEW

We review issues of statutory construction and conclusions of law, including interpretation of provisions of the Bankruptcy Code, de novo. <u>In re Tran</u>, 309 B.R. 330, 333 (9th Cir. BAP 2004), <u>aff'd</u>, 177 Fed. Appx. 754 (9th Cir. 2006). "Questions regarding the right of a debtor to claim exemptions are questions of law subject to *de novo* review[.]" <u>In re Arnold</u>, 252 B.R. 778, 784 (9th Cir. BAP 2000).

The question as to whether denial of the Debtors' Motion to Avoid Lien was appropriate in light of the "procedural irregularities" and lack of timeliness cited by the bankruptcy court presents a mixed question of law and fact. A mixed question is presented when the factual circumstances are established, the applicable law is undisputed, and the issue is

<sup>&</sup>lt;sup>4</sup> Debtors set out four issues in their opening brief. We have organized our discussion around a single driving issue.

whether under the facts of the situation, the law was appropriately applied. <u>In re Bammer</u>, 131 F.3d 788, 792 (9th Cir. 1997). We review mixed questions of law and fact de novo. <u>Id</u>.

#### VI. DISCUSSION

Subject to certain exceptions that are not relevant in this case, Section 522(f)(1)(A) provides that a debtor

may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—(A) a judicial lien....

This appeal is all about timing. The Bank focuses on a number of circumstances in the record to justify the bankruptcy court's denial of the Debtors' Motion to Avoid Lien.

When the Debtors filed their bankruptcy petition and schedules in 2001, they were aware of the Judgment Lien, as reflected in their Schedule D, but they took no steps to avoid the Judgment Lien before their case closed in 2002. The continued existence of the Judgment Lien apparently intruded on the Debtors' consciousness again when they attempted to refinance their residence property in late 2004; yet, they did not move to reopen their chapter 7 case to move to avoid the Judgment Lien until July 2005.

When the case was reopened for 120 days on August 4, 2005, to allow the Debtors to file the Motion to Avoid Lien, it took Debtors' counsel 96 days to prepare and serve the motion and 110 days to file it with the court. When the Opposition was filed one day after the Motion to Avoid Lien was filed, Debtors' counsel did not schedule a hearing, as required by the local rules of the bankruptcy court. As a result, the hearing that the

Bank's counsel attempted to schedule for its Opposition on January 3, 2006, did not go forward. After the 120-day period specified in the order reopening Debtors' case had expired, Debtors' counsel finally scheduled a hearing on the Motion to Avoid Lien for March 21, 2006, but Debtors' counsel did not file an appraiser's declaration in support of the motion until February 23, 2006, after the hearing had been scheduled and long after the Motion to Avoid Lien had been filed.

In light of that record, as admitted by substitute counsel for the Debtors at the March 21st Hearing, "the work on behalf of the [Debtors] has not been stellar by any stretch of the imagination." Transcript of March 21st Hearing, p. 16.

However, the Bank's focus sidesteps the remedial purpose of § 522(f): "[T]he purpose of lien avoidance under § 522(f) is to protect a debtor's exemptions." Goswami v. MTC Distributing (In re Goswami), 304 B.R. 386, 392 (9th Cir. BAP 2003), citing In re Pederson, 230 B.R. 158, 163 (9th Cir. BAP 1999). In a better world, debtors and their counsel uniformly would act expeditiously after they file their bankruptcy petitions to bring their motions to avoid judgment liens to issue before their cases close. However, there is no time limit to file motions to avoid liens specified in § 522(f), or indeed, in the Bankruptcy Code. Yazzie v. Postal Fin. Co. (In re Yazzie), 24 B.R. 576, 577 (9th Cir. BAP 1982).

"The key factor in allowing the late avoidance of a lien pursuant to § 522(f) is whether the creditor is sufficiently prejudiced so that it would be inequitable to allow avoidance of the lien." ITT Financial Serv. v. Ricks (In re Ricks), 89 B.R.

73, 75-76 (9th Cir. BAP 1988). See also City Nat'l Bank v. Chabot (In re Chabot), 992 F.2d 891, 893 (9th Cir. 1993) ("Absent a prejudicial delay, an avoidance action may be brought at any time....CNB basically argues that the Chabots waited too long to bring the avoidance action. This is not sufficient to show prejudice...."); In re Biannucci, 4 F.3d 526, 528 (7th Cir. 1993) ("Passage of time in itself does not constitute prejudice....But delay may be prejudicial when it is combined with other factors."); and Goswami, 304 B.R. at 392 ("In the absence of prejudice, lien avoidance actions are not barred either by entry of a discharge order or the closing of the bankruptcy case.").

In this case, at the March 21st Hearing, the bankruptcy court pressed the Bank's counsel to explain what prejudice his client had suffered as a result of the Debtors' failure to bring their Motion to Avoid Lien to issue earlier. While the colloquy extends over several pages of the transcript of the March 21st Hearing, in the final analysis, the only prejudice that the Bank's counsel could point to was the alleged unreasonable and inherently prejudicial impact of a four and a half year delay in getting the Motion to Avoid Lien to a hearing. See Transcript, March 21st Hearing, pp. 5-10.

As noted above, the mere passage of time, without more, does not constitute the type of prejudice that justifies denial of a lien avoidance motion. See Chabot, 992 F.2d at 893; and Yazzie, 24 B.R. at 578. From the record, it appears that Debtors' counsel may have been both dilatory and less than adroit procedurally in bringing the Debtors' Motion to Avoid Lien before

the bankruptcy court. However, in light of the purpose of § 522(f) to allow debtors to protect and in some cases, salvage their exemptions, the lack of a time limit in the Bankruptcy Code on lien avoidance motions and the lack of prejudice demonstrated by the Bank, we determine that it is inappropriately harsh to impose the consequences of the tardiness and procedural mistakes of Debtors' counsel on the Debtors by denying the Motion to Avoid Lien. Accordingly, we reverse the decision of the bankruptcy court and remand for further proceedings. On remand, the bankruptcy court can determine in the exercise of its discretion whether it is appropriate to impose a remedial education requirement and/or other sanctions on Debtors' former counsel.

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The Debtors argue that we should remand with directions to the bankruptcy court to enter an order granting the Motion to Avoid Lien because the Debtors' "original Motion signed under penalty of perjury and their supplemental declaration establish the amount of the liens on the property and its fair market value at the time of the petition.... Appellants' Opening Brief, pp. 11-12. The Motion to Avoid Lien was verified under penalty of perjury and included an attached Declaration of the Debtors stating that when "our case was filed our house was worth approximately \$200,000.00." Motion to Avoid Lien, Ex E. attached to the Motion to Avoid Lien was an appraisal report, purportedly prepared by Javier Corral and dated April 21, 2005, valuing the Debtors' residence property at \$270,000. Motion to Avoid Lien, Ex. C. The Declaration of George Vazquez, an appraiser retained by Debtors, was filed on February 23, 2006,

valuing the Debtors' residence property as of the chapter 7 petition date at \$266,000.00.

The Bank objected to all of the Debtors' valuation evidence on lack of foundation and other grounds. At the March 21st Hearing, the Bank's counsel admitted that the Bank had not obtained its own retrospective appraisal of the subject property, but focused on the alleged untimeliness and procedural defects in opposing the Debtors' Motion to Avoid Lien.

The bankruptcy court noted that initially, when the Motion to Avoid Lien was filed, it was not supported by the declaration of an appraiser or other expert who could testify as to the value of the residence property. The bankruptcy court also noted the Bank's objections to the evidence of value submitted by the Debtors. The bankruptcy court stated that it would sustain the Bank's objection as to the appraisal report but would overrule the objection "as to evidence submitted by the [Debtors]."

However, as admitted by the Debtors in their opening brief (see Appellants' Opening Brief, p.11), the bankruptcy court denied the Motion to Avoid Lien solely because the Debtors "failed to timely set a hearing on the objection to the initial motion to avoid the lien, period."

In these circumstances, we determine that, on remand, the bankruptcy court should schedule an evidentiary hearing so that the Debtors and the Bank can marshal and present their evidence as to the value of the Debtors' residence as of the Debtors' chapter 7 petition date to allow for a decision of the Motion to Avoid Lien on its merits.

## VII. CONCLUSION

The bankruptcy court erred in denying the Motion to Avoid Lien based on the lateness and procedural failings of the Debtors and their counsel in bringing the Motion to Avoid Lien for hearing, in the absence of any evidence of prejudice to the Bank. Accordingly, we REVERSE and REMAND for further proceedings consistent with this memorandum.